No. 11998

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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MICHAEL J. FANNING, Individually and as Postmaster of the City of Los Angeles, California,

*Appellant,*

*vs.*

AL WILLIAMS and AL WILLIAMS HEALTH SYSTEM OF LOS ANGELES, INC., a corporation,

*Appellees.*

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## APPELLANT'S REPLY BRIEF.

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### I.

### The Administrative Procedure Act Does Not Change the Well-Established Principles of Judicial Review of Postal Fraud Orders.

Under "I" of their brief, appellees attempt to brush aside the well-established rules governing judicial review of fraud orders issued by the Postmaster General set forth on pages 15 *et seq.* of Appellant's Opening Brief.

Appellees urge that the proper standard for review is to be found in Section 10 of the Administrative Procedure Act (5 U. S. C. A., Sec. 1009).

Primarily, the proceedings herein were instituted long before the passage or effective date of the Administrative Procedure Act (see Sec. 12, 5 U. S. C. A., Sec. 1011).

Second, nothing in Section 10(e) permits or contemplates any change from existing established principles of

judicial review. This section is merely declaratory of existing law concerning judicial review. See *Olin Industries Inc., v. National Labor Relations Board* (72 Fed. Sup. 225, 228 D., Mass., 1926).

The existing law as to judicial review of Post Office fraud proceedings has been carefully analyzed in Appellant's Opening Brief and the authorities therein cited clearly demonstrate that a trial *de novo* has never been allowed. The reviewing tribunal is confined to the record made before the department.

## II.

## This Action Should Be Dismissed Under the Doctrine of Leach v. Carlile, 258 U. S. 138 (1921).

Appellees' arguments in favor of affirmance are threefold. First, it contends that the instant case is governed by *American School of Magnetic Healing v. McAnnulty,* 187 U. S. 94 (1902), rather than *Leach v. Carlile,* 258 U. S. 138 (1921). Second, the Post Office medical expert, Dr. Putnam, was not worthy of credence. Third, appellees were deprived of a fair and impartial hearing before the Postal Authorities.

Before considering these contentions, a clarification of the misrepresentations charged seems desirable. Appellees are not accused of having falsely stated that their plan would reduce weight, although in their brief they repeatedly seek to create that impression (App. Br. pp. 16, 34*). The accusation is that appellees have falsely represented, through the mails, that their "Plan" would result in loss of weight, *easily and safely without enduring the*

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*Unless otherwise stated, "App. Br." is hereinafter used to designate the Brief for Appellees.

*discomfort of hunger pangs, irrespective of age or condition of health.*

This clarification eliminates the necessity of further discussing appellees' constant reiteration, expressly or by innuendo, that their "Plan" embracing "Foods That Take Hunger Away" is of conceded efficacy. Said "Plan" is not questioned as a weight reducer, but has been proven to be far from the panacea for the obese that its advertisements state.

(1) The McAnnulty Case Does Not Apply Here.

Referring to "II" of Appellees' Brief, an analysis of the *McAnnulty* decision, *supra,* shows that the defendant Postmaster, by demurring to the bill seeking injunctive relief against enforcement of a postal fraud order, conceded himself out of court by admitting the legality of plaintiff's business. Appellees are also guilty of misstatement in asserting that the Postmaster General had found "evidence satisfactory to him of fraud in the opinion of certain doctors who testified for the Government" (App. Br. p. 10). There was no testimony whatever before the Postmaster General in that case, rendering it entirely inapplicable here where the evidence, as shown in Appellant's Opening Brief, is of a scientific factual nature.

In *Leach v. Carlile, supra,* the United States Supreme Court held that the manufacturer of certain tablets which he advertised extensively through the mails as "recommended and prescribed by leading physicians throughout the civilized world for nervous weakness, general debility, sexual decline or weakened manhood and urinary disorders . . . sleeplessness and run-down system, and various other ailments," had properly been denied injunctive relief against the postal fraud order.

In referring to the scope to be given the *McAnnulty* decision, the court said (pp. 139-140):

> "Without considering whether such a state of facts would bring the case within the decision cited, it is sufficient to say that the question really decided by the lower courts was, not that the substance which appellant was selling was entirely worthless as a medicine, as to which there was some conflict in the evidence, but that it was so far from being the panacea which he was advertising it through the mails to be, that by so advertising it he was perpetrating a fraud upon the public. This was a question of fact which the statutes cited committed to the decision of the Postmaster General, and the applicable, settled rule of law is that the conclusion of a head of an executive department on such a question, when committed to him by law, will not be reviewed by the courts where it is fairly arrived at and has substantial evidence to support it, so that it cannot justly be said to be palpably wrong and therefore arbitrary. *Bates & Guild Co. v. Payne,* 194 U. S. 106, 108, 109; *Smith v. Hitchcock,* 226 U. S. 53, 58; *Houston v. St. Louis Independent Packing Co.,* 249 U. S. 479, 484; *Milwaukee Social Democratic Publishing Co. v. Burleson,* 255 U. S. 407, 413, and cases cited."

In the instant case, as clearly demonstrated on pages 19-21 of Appellant's Opening Brief, appellees have advertised through the mails a panacea for the obese; weight reduction without hunger or discomfort and increased energy irrespective of age, sex or condition of health. Also, as clearly demonstrated in such brief, appellees' "Plan" including their "Foods that take Hunger Away" falls far short of accomplishing that panacea.

Appellees seek to avoid the identity between the *Leach* and the instant cases by erroneously stating that in the *Leach* case, the "advertising indicated that the tablets were a 'panacea' for every illness known to man" (App. Br. p. 16). However, a reading of the advertising quoted above from that case clearly shows that no claim was made that the preparation was an unqualified cure-all. In fact, the "Plan" with "Foods that take Hunger Away" is as broadly advertised; being designated as a cure for dizziness, shortness of breath, heart palpitation, head and back pains, blood pressure, and other symptoms due to surplus weight (Appellant's Op. Br. p. 5).

Through appellees' advertising, it is clearly asserted that "Foods that take Hunger Away" eliminate the discomfort resulting from dieting, thereby rendering adherence to appellees' "Plan" easy [Tr. pp. 70, 71, 222-225]. The chemical and microanalyses of these "Food" tablets [Tr. pp. 91-102] show that each contains only two calories and weighs 7/10ths of a gram. Based on these analyses and his own personal knowledge of the tablets [Tr. p. 153], Dr. Putnam, the Post Office medical expert, stated that "Foods that take Hunger Away" would not prevent the followers of the "Plan" from suffering hunger [Tr. pp. 126, 127, 132, 133, 134 and 152].

Thus, appellees have advertised a panacea for the cure of obesity, a "Plan" for radical weight reduction without discomfort through the use of tablets which, under no conceivable circumstances, can possibly eliminate the ravages of hunger resulting from the dieting necessary to lose weight. The instant case is clearly embraced by *Leach v. Carlile.*

Appellees, in a further effort to escape the rule of *Leach v. Carlile,* state (App. Br. p. 17): "There are some in-

dications in the record that there is a difference of opinion on the medical issues involved in this case."

Primarily, in the *Leach* decision, there was some conflict of evidence as to the therapeutic value of the tablets, as expressly stated in the court's opinion.

Secondly, the so-called "difference of opinion" is premised on affidavits of a Dr. Charles J. Pflueger and Dr. M. John Beistel, as well as testimony of appellee Williams. These affidavits show they are nothing more than expressions of opinion [Tr. pp. 261-264]. They in no way indicate that the statements contained therein were based on any scientific tests or on any scientific measurements of caloric content or weight of the "Food" tablets. Finer expressions of what appellees term "opinion guesswork" could not be found.

Further, each affidavit states that it is impossible for the affiant to absent himself from the City of Los Angeles, California, and the Postal Authorities thus are deprived of any cross-examination. This factor alone renders the affidavits inadmissible for evidentiary purposes.

As to the testimony of appellee Williams, his own attorney conceded that "he is not testifying as a medical expert" [Tr. p. 162] and when it was suggested that Williams be examined and cross-examined as to his qualifications, his attorney conceded that he had nothing to offer [Tr. p. 166]. Under these circumstances, whatever Williams' possible testimony, it could hardly be interpreted as creating divergence of evidence on any medical issues involved herein.

Further, Williams' testimony demonstrates that conscientious adherence to the so-called "Plan," including "Foods that take Hunger Away," can create illness although the

advertisements sent through the mails in no way reveal that fact but deliberately state the contrary (Appellant's Op. Br. pp. 5-7). These advertised inducements to purchase the "Plan," "Food" tablets and massage "Creme" are replete with extravagant assertions that the user will "Feel Better, more Animated and More Vigorous."

However, in contrast to these enthusiastic representations, Williams, after testifying that reducing is very easy when the "Plan" is followed and that it worked with him, proceeded to state [Tr. p. 183] that he is 6 feet 1 inch but his weight runs between "220 and 340"; that he considered that to be a normal weight for a man of his size who is as active as he; and that if he reduced to 184 pounds, the normal weight for men of his height, he would "be sick at that weight * * *."

> "A. Because of my physical make-up, the bone structure, the muscles developed from exercise and the general set up, I wouldn't be able to walk at that weight * * *." [Tr. pp. 183, 184.]

He further conceded that as to the people with whom he dealt through the mails he didn't know anything about their bone structure except from their heights [Tr. p. 185] and when asked why he should think that others wouldn't be made sick by following the "Plan" if it had that result with him, he testified, "Well, I don't follow through the Plan right there * * *." [Tr. p. 185.] When asked about the people he sells to, he similarly testified, in most unenlightening fashion, "Well, they wouldn't go beyond—because this program right here they can't go beyond their own limitations."

> "Q. They can't go beyond their own limitations?
> A. No, sir.

Q. What is a person's limitation? A. His own requirements.

Q. What do you mean by requirements? A. I mean by his natural law." [Tr. p. 185.]

In brief, appellees advertise that by following their "Plan," including the prescribed consumption of "Foods that take Hunger Away," people will lose weight in large amounts rapidly, feel better, and more energetic, and that this regimen can be followed without danger, irrespective of age or condition of health. However, when cross-examined, appellee Williams testified that conscientious adherence to the Plan would weaken him to the point of illness but would not do so to persons following his "Plan," not because of any warnings given by him, but because of some completely undefined inchoate principle which he mysteriously labels as "natural law."

(2) The Evidence of Dr. Putnam Was Scientifically Factual and Is Entitled to Credence.

In a further attempt to bring themselves within the *McAnnulty* decision, appellees assert that Dr. Putnam's testimony was purely opinion, bordering on guesswork (III, App. Br. pp. 19 *et seq.*)

Their analysis concludes with the entirely unsupportable averment that Dr. Putnam may have been further handicapped in testifying by a "prosecutor complex" for which there is absolutely no support in the record (App. Br. p. 33). Appellant's Opening Brief has discussed in detail Dr. Putnam's qualifications, his testimony, the scientific tests made and his knowledge about the "Food" tablets and massage "Creme" [Tr. pp. 132-133, 153] so as to render needless reiteration in refutation of appellees' unjustifiable charges of vagueness, uncertainty and in-

competence. However, certain contentions advanced by appellees so torture the record as to render comment desirable.

Primarily, appellees strive to discredit this medical expert by pinning him with the appellation of "label reader" (App. Br. pp. 20, 33). However, in complete refutation, the record reveals [Tr. pp. 103, 104]:

> "Q. Will you tell us, Doctor, what your duties are at the Food and Drug. A. My duties at the Food and Drug Administration include the examination of labels to determine whether or not they comply with the various sections of the Food, Drug and Cosmetic Act. Medical advice is given when necessary on problems as they arise in the enforcement of this Act.
>
> Q. Have you made a special study, Doctor, of the condition known as obesity and its causes and treatment? A. I have."

"Glaring inaccuracies" in Dr. Putnam's caloric analysis of appellees' plan is next charged (App. Br. pp. 21-25). If, as appellees urge, the caloric intake was not as reduced as they assert Dr. Putnam claims, then loss of weight could not take place in the unusual amounts and with the rapidity that appellees advertise [Tr. p. 117].

Appellees, in this connection, purport to recalculate the "true" caloric intake under the "Plan." By assuming a maximum intake of "Food" tablets with *full* glasses of fruit juice, they attain a *per diem* maximum of 1650 calories, rather than 850. This is based on the assumption that each glass of fruit juice equals approximately 100 calories. However, on page 22 of their brief, appellees reveal that the directions only specify taking of tablets with ½ glass of fruit juice or *with* water. Obviously, if

the follower adhering to the "Plan" only uses water, his added caloric intake over 850 would only be 20 (10 tablets per day of 2 calories apiece). If he uses fruit juice, at ½ glass per tablet dose, his caloric intake would be 850, plus 400 for fruit juice, plus 20 for tablets, or a total of 1270 calories.

It is significant that in making their computation, appellees only increased by the caloric value of the fruit juices, *without including the tablets,* thus recognizing that such "Food" tablets are of little or no worth, despite their unqualified assertions to the contrary (Appellant's Op. Br. pp. 5-7). The fruit juices can be obtained from the grocer—not appellees—without incurring the useless added expenses of purchasing the "Food" tablets.

Appellees next attempt to discredit Dr. Putnam's testimony as to the dangerous effects that the "Plan" might have, particularly on sufferers of tuberculosis or diabetes (App. Br. p. 26). They curtly answer his positive testimony by merely urging that anyone who knows he has tuberculosis or diabetes is usually under medical supervision and is not apt to undertake a reducing program.

This answer is hardly consistent with appellees' basic contention that the advertisements issued by them are not misrepresentations. Those advertisements state without qualification that the "Plan" together with "Foods that take Hunger Away" are adaptable to persons of all ages, will increase their pep and energy and make them feel better. Not everyone suffering from diabetes or tuberculosis is aware of the presence of the disease. If unaware and still obese, appellees' advertising is well calculated to convince them that an easy, comfortable and eminently safe means of reducing weight, a panacea in the field of obesity, is being held forth and they may well be

tempted to pay the price and adhere to the "Plan" to their ultimate physical destruction. Nowhere do appellees apprise victims of such diseases that loss of weight—particularly in the gigantic proportions advertised by appellees—can possibly be detrimental to their condition. In fact, the advertising would lead them to a completely contrary conclusion.

However, the law, as embodied in the fraud order statutes of the United States, is interpreted to protect such victims. Thus, in reversing a judgment enjoining the enforcement of a postal fraud order, the United States Supreme Court in the recent case of *Donaldson v. Read Magazine,* 333 U. S. 178, 189 (1947), said:

> "* * * people have a right to assume that fraudulent advertising traps will not be laid to ensnare them. 'Laws are made to protect the trusting as well as the suspicious,' *Federal Trade Comm'n v. Standard Educational Society,* 302 U. S. 112, 116."

On pages 29-31 of their brief, appellees undertake to dispose of cogent authorities cited in Appellant's Opening Brief, not by discussing the material and dispositive facts, but by the unique practice of "counting noses," namely, how many experts were produced in each. Upon occasion, they vary by asserting that such experts had "wide" experience but Putnam did not, despite clear-cut refutation of such an erroneous conclusion in the record.

In contending that their representations that no strict diet is involved are true (App. Br. pp. 34-35), appellees state that descriptive words such as "strict" are merely justifiable puffing. In brief, exaggeration that might be condoned in the purchase of a horse is perfectly legitimate, according to appellees, in foisting the sale of a reducing plan upon human beings.

Nor does *Carley Company v. Federal Trade Commission,* 139 F.2d 493, in any way support appellees in this unusual assertion. There, the plan called for the eating of one caramel candy before each meal and it was represented that weight would be lost as the result without strict diet. It was admitted that consumption of sweets before eating caused loss of appetite, resulting in no need for deliberate refraining from eating. No ruling could be more dissimilar from the instant case.

(3) Appellees Received a Full, Fair and Impartial Hearing.

Appellees urge: (1) The Department spent seven months in preparing the case and appellees only had three weeks for their preparation; (2) Appellees and their counsel were unfamiliar with the procedure followed in such cases before the Post Office Department and did not realize the necessity for medical testimony; (3) Two days before the hearing an additional charge was made against appellees and was allowed by the hearing officer over appellees' objections; (4) The testimony of appellee Williams was excluded as to medical matters; (5) Testimonial letters of satisfied customers were excluded; and (6) Appellees' motions to take the depositions of Doctors Pfleuger and Beistel in California and to have the Post Office Department make all possible scientific tests to determine the efficacy of the tablets for the prevention of hunger were denied (App. Br. pp. 36-43).

*These contentions need not detain us:* That the Post Office Department had more time to prepare than appellees is something that occurs in every litigation. A plaintiff always has more time to prepare because the defendant does not learn of the suit until served and then his time to

answer or otherwise act is limited by statute or court rule. That appellees and their counsel were unfamiliar with Post Office Department procedure is nothing more than pleading ignorance of the law as a defense. Nor can appellees complain that they were deprived of adequate opportunity to present medical testimony for, as stated by the Post Office Department attorney at the hearing [Tr. p. 165], counsel for appellees could have asked for a continuance if difficulty in obtaining medical testimony occurred, that that was a well-known procedure and certainly would have been granted if requested. However, no such request was made.

Counsel distorts the record in claiming that a last minute amendment involving a new charge was forced upon appellees (App. Br. p. 38). A comparison of the charges originally made [Tr. p. 45] with the proposed amendment [Tr. p. 47] shows that such amendment was substantially covered by the original charges and, in fact, subjected appellees to no additional last-minute burden. Further, the hearing officer clearly stated that he did not wish to put appellees to the hardship of defending against anything of which they had not adequate notice and, therefore, only *conditionally* allowed the amendment subject to the provision that it would be subject to a motion to strike if appellees were unprepared to present proof thereon [Tr. p. 51].

The exclusion of Williams' testimony on medical matters was discussed heretofore. The exclusion of the testimonials was proper on the grounds, among others, that the writers thereof were not before the hearing officer, could not be subjected to examination or cross-examination, and, as pointed out by Dr. Putnam [Tr. pp. 153-154], the lay consumer of the "Food" tablets who takes them with

soup, fruit juice or milk cannot tell whether the temporary disappearance of hunger pains is due to the effect of the tablets or to the juice, milk, or soup.

Strangely enough, although the motions for the taking of the depositions of Doctors Pflueger and Beistel were made approximately two months after the close of the hearing, they still could not come to Washington and testify before the hearing officer. During the interim following the closing of the hearing, appellees had apparently made no effort to obtain available medical testimony which could be heard in Washington, D.C. Further, as previously noted, at the hearing, no continuance was requested for the purpose of obtaining medical testimony.

The foregoing are clearly indicative of the fact that appellees had no desire to meet head-on the medical issues involved in the case.

Last, the motion requesting all possible scientific tests to be made by the Post Office Department to determine the efficacy of the "Food" tablets sold by appellees, sought to impose upon that agency the necessity of obtaining human guinea pigs, if possible, for a needless test. The "Food" tablets had already been subjected to chemical and microanalyses showing the contents, caloric value, weight and bulk of the tablets and, as previously noted, the Post Office Department's medical expert, Dr. Putnam, was fully acquainted with those facts. Hence, there was no need for the making of the additional tests requested by appellees. It would seem that appellees, who extravagantly advertised such tablets as preventing hunger and increas-

ing pep and energy, for the purpose of obtaining the public's money through the mails, should have done some testing themselves before they made such unqualified and completely false misrepresentations.

## Conclusion.

This case clearly falls within the rule of *Leach v. Carlile*. The factual scientific evidence adduced shows that appellees have advertised a panacea for the obese but the "Plan" and its concomitant fall far short of the representations made. Appellees, in a frantic attempt to escape this clear conclusion, have indulged in repeated distortions of the record and a complete disregard of the actual facts of the many authorities cited by appellant in his Opening Brief. The crowning misstatement indulged by appellees is embodied in the misstatement (App. Br. p. 18) that "The Postmaster has been repeatedly restrained by the courts from giving the force and effect of law to his personal opinions * * *." A reading of the many authorities cited in both briefs clearly shows that it is indeed a rarity for any tribunal to set aside a fraud order issued by the Postmaster General.

If the judgment below is affirmed and appellees permitted to continue obtaining money from the public through their false and fraudulent misrepresentations, a roadblock to proper consumer protection will indeed exist. Neither the Food and Drug Administration nor the Federal Trade Commission will be free of the unduly restrictive interpretation given by the court below to the *McAn-*

*nulty* case. Quacks and charlatans will indeed prosper at the expense and suffering of the general public.

Hence, the judgment should be reversed, the injunction vacated and the complaint dismissed.

Respectfully submitted,

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